

RONALD A. PENE ET AL.

IBLA 98-240

Decided January 6, 1999

Appeal from a decision of the Utah State Office, Bureau of Land Management, declaring unpatented lode mining claims null and void ab initio. UMC 343404, UMC 343405, and UMC 343411.

Affirmed.

1. Mining Claims: Land Subject to--Mining Claims: Location--Mining Claims: Lode Claims--Mining Claims: Withdrawn Land--Withdrawals and Reservations: Generally

Lode mining claims are properly declared null and void ab initio if located on land that is withdrawn from mining on the date of location by a public land order.

2. Mining Claims: Land Subject to--Mining Claims: Location--Mining Claims: Lode Claims--Mining Claims: Placer Claims--Mining Claims: Withdrawn Land--Withdrawals and Reservations: Generally

Placer and lode mining claims are distinct types of claims. Lode mining claims located within the boundaries of placer claims with valid existing rights do not acquire the location date of the placer claims but are new claims.

APPEARANCES: Ronald A. Pene, Grand Junction, Colorado, pro se, and for other Appellants; John W. Steiger, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Ronald A. Pene et al. 1/ have appealed the March 9, 1998, decision of the Utah State Office, Bureau of Land Management (BLM), declaring

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1/ The Notices of Location for the three mining claims involved in this case identify the locators as Ronald A. Pene, Larry Key, Ray Pene, and Tony Pene. The decision was addressed to and served on Ronald A. Pene, Ray Pene, Tony Pene, Larry Key, and Ray D. Anderson.

unpatented lode mining claims Kelli Jo No. 1 (UMC 343404), Kelli Jo No. 2 (UMC 343405), and Kelli Jo No. 8 (UMC 343411) null and void ab initio, as the land was withdrawn from mineral entry at the time of location because official land records show that the three claims are situated entirely on lands withdrawn for the Westwater Canyon Corridor on the Colorado River.

We first consider pending procedural questions. Appellants have submitted numerous pleadings <sup>2/</sup> addressing not only BLM's March 9, 1998, decision, but also two mining contests filed by the Utah State Office, BLM. <sup>3/</sup> This Board lacks jurisdiction over the mining contests until such time as the administrative law judge issues an adverse decision and a timely notice of appeal is filed. See 43 C.F.R. §§ 4.410(a) and 4.452-9. Accordingly, we have not considered matters raised in Appellants' pleadings concerning the pending contests or not directly affecting BLM's March 9, 1998, decision.

On October 1, 1998, BLM, through counsel, filed a Notice of Entry of Appearance, Motion for Expedited Consideration, Motion for Leave to Submit an Answer, and Answer. BLM bases its request for expedited consideration on the fact that the three mining claims involved in this appeal are also involved in mining claim contest UTU-77104. BLM points out that, if we uphold its determination that the three claims are null and void ab initio, it would not be necessary to litigate the validity of the claims in the contest before the administrative law judge. It also

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fn. 1 (continued)

BLM received separate Notices of Appeal from Kathy Pene, Tony Pene, Wanda Pene, Raymond Pene, Sharon Key, and Larry Key. There is no notice of appeal from Ray D. Anderson.

Appellants submitted statements that Ron Pene, Project Manager for Pene Mining, would submit a statement of reasons (SOR) on the Appellants' behalf. It would appear that Raymond and Kathy Pene, and Wanda Pene and Tony Pene are family members of Ronald A. Pene. Ronald A. Pene is not an attorney, but is authorized to represent family members before this Board under 43 C.F.R. § 1.3(b)(3)(i). Although it is far from clear from the record, we shall presume that he is authorized to represent Larry Key and Sharon Key as part of the Pene Mining partnership. See 43 C.F.R. § 1.3(b)(3)(ii).

<sup>2/</sup> In addition to an SOR filed prior to docketing, Appellants also filed: a second SOR on May 1, 1998; an objection to BLM's motions to intervene, etc., on Oct. 8, 1998; two supplemental pleadings on Oct. 13, 1998; and another supplemental pleading on Nov. 2, 1998.

<sup>3/</sup> One of those contests was initiated on Mar. 9, 1998, when BLM filed a complaint (UTU-77104) asserting that "[m]inerals have not been found within the limits of the claims in sufficient quantities and/or qualities to constitute a valid discovery of a valuable mineral deposit" on numerous mining claims, including the Kelli Jo Nos. 1, 2, and 8. The claims involved in that contest are the Kelli Jo Nos. 1 through 4 (UMC 343404 through UMC 343407), 7 (UMC 343410), 8 (UMC 343411), 11 through 13 (UMC 343414 through UMC 343416), 15 through 18 (UMC 343418 through UMC 343421), 20 (UMC 343423), and 21 (UMC 343424).

notes that Appellant Ronald Pene has requested expedited consideration before Administrative Law Judge Heffernan in the mining contest. (Answer at 4.) Appellants object to the granting of expedited consideration, but have failed to provide any reasons for their objection. Their objection relates to the timing of BLM's filing of the document requesting expedited consideration, not to expedited consideration itself.

We agree that expedited consideration is appropriate in light of Appellant Ronald Pene's request to the administrative law judge for an expedited hearing in the pending contest. Until it has been determined that the land was open to mining location, the question of the sufficiency of any discovery is premature insofar as the validity of the claim is concerned. E.J. Belding, Jr., 109 IBLA 198, 203, 96 I.D. 272, 275 (1989). As our ruling moots the question of whether a discovery exists on the claims, it renders it unnecessary to proceed with the contest as to these three claims, thus economizing decisionmaking resources and justifying granting of expedited consideration.

Appellants object to BLM's filing a request to file an answer more than 30 days after its receipt of the SOR, citing Sainberg v. Morton, 363 F. Supp. 1259 (D. Arizona 1973). Appellants note that the District Court in that case "refused to allow applicants for a mineral patent to answer a mineral contest complaint one day after 30-day period specified in the regulation for filing such an answer." (Oct. 8, 1998, Supplement.) Appellants' reliance on Sainberg is misplaced. The Court therein considered two regulations that deal specifically with Government contest proceedings and are therefore inapplicable here. <sup>4/</sup>

The applicable regulation here is 43 C.F.R. § 4.414, which provides: "If any party served with a notice of appeal wishes to participate in the proceedings on appeal, he must file an answer within 30 days after service on him of the notice of appeal or statement of reasons \* \* \*." Although the regulation does not expressly so state, it is well established that the filing of an answer by BLM is governed by 43 C.F.R. § 4.414. Here, BLM admittedly failed to meet the requirements of 43 C.F.R. § 4.414 in submitting its Answer, which was filed more than 30 days after counsel for BLM received Appellants' first SOR.

However, 43 C.F.R. § 4.414 (unlike the regulations governing Government contests) expressly provides that "[f]ailure to answer will not

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<sup>4/</sup> The first, 43 C.F.R. § 1852.1-7(a) (1973) (presently codified as 43 C.F.R. § 4.450-7(a)), provides: "If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing." The second, 43 C.F.R. § 1852.1-6 (1973) (presently codified as 43 C.F.R. § 4.450-6), provides: "Within 30 days after service of the complaint or after the last publication of the notice, the contestee must file in the office where the contest is pending an answer \* \* \*."

result in default," and that, if "an answer is not filed and served within the time required, it may be disregarded in deciding the appeal." (Emphasis added.) In the absence of evidence that an Appellant is prejudiced by BLM's failure to timely file its answer, it is properly accepted and considered in the Board's deliberations on appeal. See Cyprus Shoshone Coal Corp., 143 IBLA 308, 310 n.1 (1998); Animal Protection Institute of America, 118 IBLA 345, 347 (1991); Catlow Steens Corp., 63 IBLA 85, 87 n.3 (1982). Appellants have not shown that they will be prejudiced or injured in any way by the Board's acceptance of the BLM answer. <sup>5/</sup> The delay in the BLM filing has not delayed the Board's consideration of the appeal. Moreover, Appellants have had ample opportunity to respond to the arguments put forth by the BLM in its late-filed Answer. Accordingly, we grant BLM's motion for leave to submit an answer.

[1] Turning to the merits of the appeal, we note that the notices of location for the three claims at issue indicate their locations as follows: Kelli Jo No. 1, entirely within Lots 1 and 3, sec. 27, and Lot 1 and the NW<sup>1</sup>/<sub>4</sub>NW<sup>1</sup>/<sub>4</sub>, sec. 26, T. 20 S., R. 25 E., Salt Lake Meridian (straddling the north/south line between secs. 26 and 27); Kelli Jo No. 2, entirely within Lot 1 and the NW<sup>1</sup>/<sub>4</sub>NW<sup>1</sup>/<sub>4</sub> sec. 26, T. 20 S., R. 25 E., Salt Lake Meridian (to the east of Kelli Jo No. 1); and Kelli Jo No. 8, entirely within Lots 1 and 3, sec. 26, T. 20 S., R. 25 E., Salt Lake Meridian (cornering and to the southeast of the Kelli Jo No. 2 claim).

Effective on December 28, 1988, Public Land Order No. (PLO) 6694 "withdrew 4,707.44 acres of public land from surface entry and mining for a period of 5 years for BLM to protect recreational, scenic, and cultural values of the Westwater Canyon corridor of the Colorado River in aid of legislation amending the Wild and Scenic Rivers Act." 53 Fed. Reg. 52424 (Dec. 28, 1988). Expressly included in that PLO were the Lots 1 through 5 and the NW<sup>1</sup>/<sub>4</sub>NW<sup>1</sup>/<sub>4</sub>, sec. 26, and Lots 1 to 5, sec. 27, T. 20 S., R. 25 E., Salt Lake Meridian. This includes all of the lands covered by the three claims at issue in this appeal.

The notices of location filed by Appellants for the Kelli Jo Nos. 1, 2, and 8 claims indicate that the date of location for these claims is April 30, 1991. Thus, at the time of location, the land was withdrawn by PLO 6694. We find nothing improper in the issuance of the PLO that could in any way mitigate its effect, which was clearly to withdraw certain lands, including those covered by Appellants' mining claims, from mineral entry.

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<sup>5/</sup> Appellant Ronald Pene asserts that the delay caused him to have to go through the effort of filing the appropriate affidavits and paying the fees, whereas if BLM had filed a timely response he might have known whether the claims were voided. (Affidavit at 2.) However, the BLM decision informed Appellants that BLM deemed the claims to be null and void and the BLM Answer merely reiterates and explains that decision.

A mining claim located on land closed to entry under the mining laws confers no rights to the locator and is properly declared null and void ab initio. See, e.g., Richard L. Goergen, 144 IBLA 293 (1998); William Douglas Wells, 141 IBLA 144 (1997); Lucian B. Vandergrift, 137 IBLA 308 (1997); Merrill G. Memmott, 100 IBLA 44 (1987).

The conclusion that the three claims on appeal were located on land not open to mineral entry is not changed by the fact that an expiration date is indicated in the PLO. Lands included in a withdrawal remain withdrawn until the withdrawal is revoked, modified or terminated by appropriate official action. As we have observed in the past, "[e]ven assuming arguendo that revocation of the withdrawal subsequent to the date of the location of appellants' placer mining claims was accomplished, the revocation would not restore or validate appellants' claims." Kathryn J. Story, 104 IBLA 313, 315 (1988); Ronald W. Ramm, 67 IBLA 32 (1982); Tenneco Oil Co., 8 IBLA 282 (1972).

Appellants also contend the area is not a Wilderness Study Area because it does not meet the criteria for such and moreover was not designated as such until 1985. The time for appealing the withdrawal of these lands has long expired. Objections to the merits of a withdrawal are not justiciable in the context of an appeal from a decision considering the effect of that withdrawal. See Harry E. McCarthy, 128 IBLA 36, 41 (1993); Pluess-Stauffer (California), Inc., 106 IBLA 198, 199-200 (1988).

[2] Appellants do not dispute that the claims are within the area withdrawn by PLO 6694, but assert the Pussycat Nos. 1 to 6 placer mining claims, evidently located in 1984, predate PLO 6694, so that the PLO is "nothing more than an incumbrance" and taking of their rights under the 1872 Mining Law. (Response at 3.) Appellants contend that, owing to those claims, they have "possessory title" and the "exclusive right of possession and enjoyment of all the surface included within the lines of their location." (Response at 4.) They maintain that, because lode mining claims Kelli Jo Nos. 1, 2, and 8 were located within the external boundary lines of the existing placer claims, under the pedis possessio rule, all lode claim discoveries were completed and discovery monuments in place by 1984 when the Pussycat claims were located in 1991.

The location of a mining claim, even if unsupported by a discovery, may afford a claimant protection under the doctrine of pedis possessio against subsequent intrusions of others while he or she remains in continuous, exclusive occupancy and diligently attempts to make a discovery. See generally Union Oil Company of California v. Smith, 249 U.S. 337 (1919). This doctrine, however, does not apply as against the United States, the legal title holder of the property. See, e.g., Cameron v. United States, 252 U.S. 450, 456 (1920); United States v. Williamson, 45 IBLA 264, 277-78, 87 I.D. 34, 41-42 (1980); R. Gail Tibbetts, 43 IBLA 210, 218-19, 86 I.D. 538, 542-43 (1979). A mining claimant's rights as against the United States are acquired only under the General Mining Law, 30 U.S.C. § 21 (1994), and unless and until the claimant meets the requirements under those laws, no rights can be asserted against the United States. United States v. Multiple Use Inc., 120 IBLA 63, 79 (1991).

Placer claims and lode claims are two distinct types of claims. Paul Vaillant, 90 IBLA 249, 252 (1986); United States v. Haskins, 59 IBLA 1, 44, 88 I.D. 925, 947 (1981). The two types of claims are located for altogether different reasons and are distinct entities. Paul Vaillant, 90 IBLA at 253. Placer discoveries will not sustain lode locations and *vice versa*. Cole v. Ralph, 252 U.S. 286, 295 (1920); Hiram Webb, 105 IBLA 290, 303, 95 I.D. 242, 250 (1988); United States v. Haskins, 59 IBLA at 44, 88 I.D. at 946.

Furthermore, placer rights emanating from holding and working under the General Mining Law, 30 U.S.C. § 38 (1994), do not inure to lode locations; placer rights can only be asserted in the context of a placer claim. Hiram Webb, 105 IBLA at 303-05, 310, 95 I.D. at 250-51, 254. Thus, the lode locations made in 1991 cannot gain any rights from the placer claims and must be treated as new locations. As noted above, BLM's decision must be affirmed because the claims were located at a time when the lands were withdrawn from mineral entry and were therefor null and void ab initio.

Appellants argue that BLM did not follow section 4(b) of the Surface Resources Act of 1955 (SRA), 30 U.S.C. § 612(b) (1994). They cite the portion of the SRA that states that the land management agency may regulate surface uses if they do not materially interfere with or endanger the operations of the mining claimant. The exact language of the pertinent portion of the statute is that "any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto \* \* \*." 30 U.S.C. § 612(b) (1994). The SRA is concerned with activities that might affect mining operations on valid claims. BLM's decision does not interfere with or endanger mining operations on valid claims because it ruled that the claims are null and void ab initio. It is axiomatic that operations may not legally proceed on invalid claims.

Appellants stress BLM's previous inconsistent treatment of these claims. The record shows that, on June 21, 1991, BLM issued two decisions addressed to Ronald Pene, et al. One declared the Kelli Jo No. 1 (UMC 343404), No. 7 (UMC 343410), and Kelli Jo No. 20 (UMC 343423) null and void ab initio in part, and the other declared the Kelli Jo No. 2 (UMC 343405), Kelli Jo No. 3 (UMC 343406) and Kelli Jo No. 20 (UMC 343423) null and void ab initio in part. <sup>6/</sup> Both decisions were based on a

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<sup>6/</sup> In their pleading filed on Nov. 2, 1998, Appellants note that BLM's June 21, 1991, decisions did not inform them of their right to appeal. That omission appears to have been error on BLM's part. However, because BLM rescinded those decisions, Appellants suffered no injury from that failure. BLM is reminded to inform parties of their right to appeal from adverse decisions.

Appellants also seek the right to appeal from BLM's decision to refund the \$300 they paid for the Kelli Jo Nos. 1, 2, and 8. We fail to see how a BLM decision to refund money can be an adverse action when it has no effect on the validity of the claims.

determination that the claims were located in whole or in part on land segregated from mineral entry by PLO 6694.

However, On March 29, 1993, BLM issued a decision rescinding both of the June 21, 1991, decisions because they were issued in error. That decision stated:

By decisions dated June 21, 1991, this office declared the subject mining claims null and void in their entirety, and null and void in part for the reason that the claims were located partially and entirely within a withdrawal under the Westwater Canyon Corridor on the Colorado River, Utah, U-62507, by Public Land Order 6694, dated December 28, 1988.

Upon further investigation, it has been determined that the subject mining claims declared entirely within this area are only partially within the area. Also, since the claims that were declared null and void in part were lode claims, which have extra-lateral rights, this action was taken erroneously.

Therefore, the decision letters of June 21, 1992 are hereby rescinded.

It is now clear that the March 29, 1993, decision was incorrect as to the Kelli Jo Nos. 1, 2, and 8 claims, which are all entirely within the area covered by PLO 6694.

Although BLM offered no explanation in its decision for this obvious reversal of opinion, it is clear that its most recent action is correct. <sup>7/</sup> BLM is not bound or estopped by prior inconsistent action from issuing a decision correctly applying the law. See 43 C.F.R. § 1810.3(b) and (c).

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<sup>7/</sup> In view of the obvious conflict between the decision under appeal and its previous action, BLM should have specified in its decision precisely what lands were covered by the three claims involved and precisely what lands were covered by the PLO. BLM is reminded that it must ensure that its decision is supported by a rational basis which is set out in the written decision, as well as demonstrated in the administrative record accompanying the decision. Parties affected by a BLM decision deserve a reasoned and factual explanation of the rationale for the decision and must be given a basis for understanding it and accepting it or, alternatively, appealing and disputing it. Nevada Division of Wildlife v. BLM, 145 IBLA 237 (1998); Kanawha & Hocking Coal & Coke Co., 112 IBLA 365, 368 (1990); Eddleman Community Property Trust, 106 IBLA 376, 377 (1989); Roger K. Ogden, 77 IBLA 4, 7, 90 I.D. 481, 483 (1983). However, no remand is necessary here, as Appellants were able to overcome any difficulty they may have initially encountered when BLM failed to present an adequate explanation of the basis for its decision and presented an informed and organized appeal and were not, we find, unduly prejudiced by BLM's initial omission. Nevada Division of Wildlife v. BLM, *supra*.

Appellants complain that, unlike for other claims held by them, BLM declined to accept 1999 Maintenance Fees for the three claims involved in this appeal and question why BLM kept the fees for all of the other claims when (they state) it had voided all of the claims and not just the Kelli Jo Nos. 1, 2, and 8. BLM explains on appeal that, because an appeal had been filed from the decision declaring these three claims null and void ab initio, but no stay had been requested, the "voidance decision" remained in effect, and BLM would not accept any fees for those three claims during the pendency of the appeal. Thus, BLM stated that it could not accept the 1999 Maintenance Fees for those claims and the money would be refunded.<sup>8/</sup> It is thus clear that BLM has not issued any "voidance" decision concerning claims other than the Kelli Jo Nos. 1, 2, and 8. The initiation of a mining contest challenging the validity of the Pusycat Nos. 1 through 6 placer claims is not a "voidance" decision by BLM, but a mining contest in which BLM is asserting that there is no valid discovery to support the claims. BLM accepted the fees for the claims included in the mining contests because they have not yet been declared invalid, unlike the three claims at issue in the instant appeal.

Appellants also question why the Kelli Jo Nos. 1, 2, and 8 are included in UTU-77104. The answer is that, if the Board had reversed BLM's decision declaring the claims null and void ab initio, BLM could still have challenged their validity for lack of discovery.

To the extent not specifically addressed herein, Appellants' other arguments have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

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David L. Hughes  
Administrative Judge

I concur:

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Gail M. Frazier  
Administrative Judge

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<sup>8/</sup> This action was consistent with the procedures specified in BLM Instruction Memorandum No. 98-01 addressing, inter alia, maintenance fee requirements for voided mining claims during an appeal of the voidance decision. See Lenore L. Baird, 145 IBLA 335, 337 (1998).



